Supreme Court, U. S.
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No. 77-94

In the Supreme Court of the United States

OCTOBER TERM, 1977

M & H PRODUCE CO., INC., PETITIONER

v.

BOB BERGLAND, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The Secretary of Agriculture determined, after formal adjudicatory proceedings, to revoke petitioner corporation's license as a dealer in perishable agricultural commodities under the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a *et seq.* Reversing an initial decision by an administrative law judge (J.A. 25),[1] the Judicial Officer of the Department of Agriculture found that petitioner had failed in its statutory obligation (7 U.S.C. 499b(4)) to make full payment promptly for 129 lots of commodities purchased from 15 sellers. Instead, petitioner had, as part of an arrangement

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[1] "J.A." refers to the joint appendix in the court below.

with creditors, paid only 25 per cent of the agreed purchase price between seven and ten months after it was due. On these facts, which are not disputed, the Judicial Officer concluded that petitioner's violation was wilful, flagrant, and repeated (J.A. 64). He therefore revoked petitioner's license pursuant to 7 U.S.C. 499h(a).

On direct review under 28 U.S.C. 2342(2), the court of appeals affirmed (Pet. App. A1-A3).

In this Court, petitioner contends that the Secretary of Agriculture was estopped to undertake disciplinary proceedings against it because Department of Agriculture officials allegedly assured it that no disciplinary proceedings would be initiated if petitioner made a 25 per cent payment to unsecured creditors (Pet. 7, 14).

The Judicial Officer rejected this contention as not supported by the evidence (J.A. 144-155). After reviewing the record, the court of appeals agreed (Pet. App. A-3):

> [T]he company has no defense that promissory estoppel bars the imposition of the sanction here. It appears, first of all, that the judicial officer properly found that the record did not establish that the government had made a promise to withhold a disciplinary proceeding on the condition that 25% would be paid to the unsecured creditors. Evidence in the record, *e.g.*, the memos of an attorney for the company, suggests rather, as the judicial officer believed, that the assurances of the government were directed not at disciplinary prospects but at reparations sanctions, which could be avoided if the aggrieved parties were satisfied. Moreover, the judicial officer properly found that the record did not show that there was a change in position in reliance on the purported promise. In other words, the partial payment would likely have been made for the company by the employees regardless of any considerations as to possible disciplinary proceedings. Mr. Hyman [who controlled petitioner] agreed to give up all his assets to make the payments at a meeting that came ten days before the creditors even submitted their informal complaints to Agriculture. The record amply supports the suggestion of the judicial officer that there were many other concerns, like the threat of criminal prosecution, that animated Mr. Hyman's contributions to the company's payments.[2]

There is no reason for this Court to review further this factual issue.[3]

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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[2]Mr. Hyman and his son-in-law were subsequently convicted of mail fraud arising from a scheme to kite checks to meet the firm's current obligations (J.A. 205).

[3]Because petitioner's claim of estoppel lacks factual support, the Court need not consider petitioner's contention that the judgment below conflicts with Ninth Circuit decisions holding that the government may be equitably estopped by conduct of its officials. See, *e.g.*, *United States* v. *Lazy FC Ranch*, 481 F. 2d 985 (C.A. 9); But *cf. Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380; *United States Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5.

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